

COMMENTS OF CENTRAL DELTA WATER AGENCY  
BEFORE THE STATE WATER RESOURCES CONTROL BOARD'S  
FOURTH WORKSHOP TO REVIEW STANDARDS FOR THE  
SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY

July 13, 1994

Central Delta Water Agency representatives have attended each of the previous three workshop sessions. It is our understanding, based upon comments made by individual board members during those sessions, that notwithstanding the specific issues designated in this workshop notice, the Board is looking for suggestions and guidance on the broad subject of what role it should attempt to play in the Bay-Delta picture, given intervention by the various federal agencies. These comments reflect our views on that subject and are largely reflective of previous statements we have presented on the subject, most notably in our comments on Draft Water Rights Decision 1630.

In general, we believe the Board must make a strong commitment to reversing the declines in the significant natural and introduced fishery species dependent upon the estuarine system. Whatever measures the Board requires of the affected diverters will be much in the nature of an experiment, the results of which must be closely and regularly reviewed due to the critical levels of many of these fishery populations which have resulted from many years of abuse by project storage and export of massive proportions of the water supplies of the system.

The best information available dictates that the mixing zone must be returned to Suisun Bay to provide an appropriate nursery area for the many fish populations dependent upon this Estuary. This is the apparent intent of the EPA standards, and it is appropriate that the Board focus on this goal and these standards in this review. Re-creating appropriate habitat conditions in Suisun Bay will redress a multitude of problems, especially providing more appropriate channel conditions for fish survival and keeping the populations during early life stages away from the influence of export diversions.

Re-establishing proper water quality conditions in Suisun Bay will require more outflow. More flow in tributary streams may be required during critical fish migration and spawning periods and some fish protective measures may be required when, and where, fish are present in large numbers. To accomplish appropriate conditions, we make the following suggestions:

1. **Export Limits:** Exports should be limited to only surplus water and to quantities on a sliding scale in direct relation to resulting Delta outflow to insure that the mixing zone will be properly located and that reverse flow conditions in the western Delta will be minimized.

2. The fishery needs which cannot be met by way of salinity control or the reduction of exports by the CVP and SWP should be addressed by stream flow requirements tailored to the needs of each tributary.

a. Rediversion of portions of the Hetch Hetchy (Tuolumne) and Mokelumne River supplies at the Delta by San Francisco and East Bay MUD could provide needed tributary flow in the Tuolumne and Mokelumne Rivers with no significant loss of yield to the exporters.

b. Conjunctive use of groundwater with surface supplies can facilitate increased stream flow into the Delta during dry periods. To the extent such efforts contribute to Delta outflow for salinity control or augment the supply of the CVP or SWP, compensation should be paid by the CVP and SWP.

c. Reoperation of upstream reservoirs based on risk analysis and opportunities for short term augmentation of storage capabilities should be evaluated.

3. Export demand should be reduced in the drier years by:

a. Voluntary water transfers among export contractors to reallocate export deficiencies.

b. Encouraging compensated land retirement along the west side of the San Joaquin Valley particularly in areas contributing large quantities of selenium and other salts.

c. Requiring more appropriate land use planning and regulation, even beyond the urban MOU requirements. New development which is dependent upon exports from the Delta and the watersheds tributary thereto should be precluded. Areas dependent upon exports should be required to develop

plans to achieve water self sufficiency. As northern California continues to grow, watershed of origin priorities will be asserted and the amount of surplus water available for export will diminish. Such self sufficiency plans should incorporate 1) water conservation, 2) water reclamation including desalting brackish and if necessary sea water, 3) higher levels of treatment of sewage effluent to allow for safe use of effluent for irrigation of golf courses and landscaping, and 4) installation of dual water systems particularly in new developments.

d. Requiring conjunctive use of surface and groundwater supplies recognizing the value of water banking including over irrigation in wetter years in appropriate areas.

Our view of previous Board action is that there is a tendency to rely principally upon pulse flows to restore fish populations. Pulse flows alone will not be sufficient to reverse the trends leading to extinction of major fisheries dependent upon the Bay-Delta Estuary. If properly timed and protected, pulse flows will be helpful in moving fish eggs, larvae and fry past the major diversions and into areas west of the Delta where survival is a greater possibility. Once there, however, the fish must not be allowed to be drawn upstream by excessive export pumping. Maintenance of adequate outflows in relation to the amount of export pumping appears to be critical.

In re-establishing water-related conditions conducive to fish survival, the Board must not disregard the priority system under which water rights have been acquired in the water supply tributary to the Delta. Otherwise, the Board would be indefensibly violating the very basis upon which the water laws of this state have been established. In its prior rulings, the Board has sought to spread to other water right holders burdens which should be borne by the export projects.

The State Water Project and the Central Valley Project, generally speaking, are the two major junior water rights holders on the system and are collecting water in the Delta for export south. Both projects also have at least a statewide constituency and are in a position to spread costs broadly.

Even though the task is difficult, the Board should not avoid approaching the re-establishment of healthy fishery conditions within the long established structure of water rights priorities relating to the various water sheds tributary to the Delta. The Board's action must accord respect to water rights priorities and the mandates of the Delta Protection Act (WC 12200 et seq.), Watershed Protection Statutes (WC 11460 et seq.), and Area of Origin Statutes. As such, these responsibilities should fall most heavily on the CVP and SWP exports.

The Raccanelli decision settled any remaining doubt that in authorizing the Central Valley Project to provide

"river regulation," Congress was directing the Bureau of Reclamation to provide Salinity Control for the Delta. The proceedings of this Board and its predecessor are replete with the Congressional history of the Central Valley Project Act, including the evidence that "river regulation" meant preventing the 1000 part per million chloride salinity line from intruding past a point .6 of a mile west of Antioch.

The State Water Project is directed to provide salinity control for the Delta by the Delta Protection Act, which passage accompanied the legislative authorization of the SWP. Similarly, California law recognizes a priority of use in the areas of origin under the County of Origin and Watershed Protection Acts as against the export projects.

More specifically, the Board must:

1. Address the critical need of controlling ocean salinity intrusion both from the standpoint of providing adequate "in-Delta" water quality for domestic, agricultural, municipal, and industrial uses and for the purpose of providing proper water quality conditions in Suisun Bay to provide historical nursery habitat for anadromous fish. It would appear from previous rulings that the Board's desire to maintain the export of water from the Delta near current levels is improperly accorded a higher priority than the protection of the public trust or Delta water quality. The obligation for providing adequate salinity control is that of the CVP and SWP. Such obligation is a major part of the quid pro quo for extracting surplus water from the north for

export to the south. Appropriators who are junior to the CVP and SWP and who are not entitled to watershed of origin preference must of course not divert to the detriment of the SWP and CVP.

2. Limit SWP and CVP exports from the Delta to water that is truly surplus to needs of the Delta and other areas of origin.

3. Recognize the priorities afforded to "areas of origin" by way of Water Code Sections 10505, 11460, 12200, et seq. In addressing public trust needs, the CVP and SWP exports must be eliminated before considering requirements to be imposed on water users within the "areas of origin" and other exporters with priorities senior to those of the CVP and SWP.

The next focus is required to be on other exports from the "areas of origin." See Water Code Sections 1215 et seq., and 10505. Once all exports are eliminated, the public trust needs should be re-evaluated in terms of requirements to be imposed upon water users within the "areas of origin."

4. Recognize water right priorities. Once exports from the "areas of origin" are eliminated, the allocation of public trust requirements should follow water right priorities. Except as to riparians and pre-1914 appropriators, the SWRCB may exercise its jurisdiction pursuant to the permit and license terms and conditions but subject to water right priorities (WC 1450). Unless the SWRCB has found that

a particular diversion or method of diversion is uniquely unreasonable or wasteful, there is no justification for overriding water right priorities. As to riparians and pre-1914 appropriators, the SWRCB lacks jurisdiction to retroactively apply public trust requirements in that it never had jurisdiction relating to issuance of such rights. The attempt to bootstrap jurisdiction through Article X, Section 2 is inappropriate unless the use or method of use is found to be uniquely wasteful or unreasonable. If the use or method of diversion is consistent with the practices of other water users with junior priorities, then the priorities must be recognized.

5. Act sensitively in respect to its conflict of interest when dealing with allocation of water rights as between the State and other water rights holders. Such action is particularly appropriate when concurrent jurisdiction exists with the Courts such as in applying Article X, Section 2. In order to avoid the appearance of impropriety, the SWRCB has the duty to refer or defer to court proceedings providing truly independent review and action.

6. Require the SWP and CVP to compensate third parties for pulse or other public trust flows required in or from tributaries upstream of the Delta to the extent that the SWP and CVP are allowed to export such water and to the extent that the SWP and CVP burden for salinity control is lessened by such water.

7. Address the salt loading in the San Joaquin River caused by the failure of the CVP to construct a valley drain. The CVP should be required to fully mitigate such salt loading by reducing water deliveries into the west side of the San Joaquin Valley until such a drain is operational. To do otherwise is to allow a clearly unreasonable use of water by way of a junior water right over which the SWRCB can exercise jurisdiction through reserved jurisdiction.

8. Avoid the temptation to shift responsibility onto the senior rights by imposition of mitigation or monitoring fees. The imposition of a per acre foot charge on water consumed by "in-Delta" agricultural users would be particularly burdensome and could result in the financial inability to maintain Delta levees. Water users in the Delta already pay substantial charges for operation and maintenance of levee systems and pumps to keep Delta lands drained. Most Delta districts are entirely dependent upon farming for generation of the revenues for such operation and maintenance and many of the farms are in financial difficulty. The evidence is absolutely clear that water consumption or loss would be on the average of 2 acre feet per acre higher if Delta lands below channel water level were allowed to remain flooded rather than farmed. Some levee systems, particularly those in the Western Delta, are additionally deemed critical to the practical ability to repulse ocean salinity.

The fishery problems in the Delta are clearly not the result of diversions onto Delta lands. The Delta was fully irrigated prior to the advent of the CVP and SWP and the fisheries appeared to be flourishing. Imposition of fees on "in-Delta" water consumption in the manner previously suggested is not only without authority, but

- a. violates the Delta Protection Act;
- b. violates water rights priorities;
- c. violates watershed protection statutes;
- d. has no rational relationship to the cause of the problem to be addressed;
- e. is both arbitrary and capricious; and
- f. may cause significant adverse environmental impacts.

This is not to say, however, that Delta users are free from all responsibility for helping to repair problems created specifically by their water use.

Largely, as a result of export operations which have moved the anadromous fish nursery farther into the Delta and altered migration routes, some anadromous fish are undoubtedly sucked up in agricultural siphons in the Delta. Current studies indicate limited impact from Delta agricultural diversions, restricted both by geographic area and time of operation. Re-establishing water quality conditions necessary to return critical nursery habitat to the broader, shallower channels of Suisun Bay, and reducing reverse flows caused by excessive export pumping by the projects, should

lessen the impact of Delta agricultural diversions on small fish.

Nevertheless, if Delta agricultural diversions are shown to be impacting targeted native fishes, such impacts should likewise be mitigated, in accordance with the fish screen policy statement of the Central Delta Water Agency and the comments and procedures presented by the California Farm Bureau Federation to the Acting Regional Director of the National Marine Fisheries Service on March 28, 1994. Copies of such policy and comments are attached.

9. Avoid imposing requirements for ocean salinity control on water right holders other than the SWP and CVP. The imposition of the obligation for "salinity control" on the CVP and in turn upon the SWP was a tradeoff or compensation for the exportation of water from Northern California watersheds. The SWP and CVP should not be allowed to slip away from this obligation and certainly should not be allowed to pass this obligation onto senior water right holders. The State and Federal Governments have carried out and/or allowed projects which have increased the burden of salinity control such as the various shipping channel deepening projects, thereby making the shifting or re-locating of the salinity control obligation even more unfair.

10. Apply California Constitution Article X, Section 2 to the patently wasteful and unreasonable SWP diversion of water over seven hundred miles in open canals with a 3000

foot lift to foster development in the deserts of Southern California. The record is clear that desert area water use per household is about 65% higher than in the coastal area and about 30% higher than in the inland valley. It is also obvious that the electrical power consumption per acre foot associated with such transport and lift greatly exceeds that of any of the senior water right holders within the northern California watersheds. There is absolutely no justification for taking water and money away from senior water right holders to subsidize the wasteful and unreasonable use and diversion by a junior appropriator.

Respectfully submitted,

THOMAS M. ZUCKERMAN AND  
NOMELLINI, GRILLI & McDANIEL  
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## CENTRAL DELTA WATER AGENCY

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December 17, 1993

VIA AIRBORNE EXPRESS AND  
FACSIMILE NO. (310) 980-4027

Gary Matlock  
Acting Regional Director  
NMFS, Southwest Region  
501 West Ocean Boulevard, Suite 4200  
Long Beach, California 90802-4213

Re: Advance notice of proposed rulemaking - Endangered  
Species, Screening of Water Diversions to Protect  
Sacramento River Winter-Run Chinook Salmon

Dear Sir:

The Central Delta Water Agency encompasses approximately 120,000 acres of primary agricultural lands within the central portion of the Sacramento/San Joaquin Delta. The boundaries of the agency are shown on the attached map.

Delta agricultural diversions vary as to time and duration and cannot be equated to Delta agricultural consumption or channel depletion.

Most of the land in the Central Delta Water Agency is below the level of the water in the adjoining channels and is irrigated by way of siphons. The water table is high and constant drainage pumping is needed to keep the water table below the surface of the ground. Although we do not have an accurate count of the number of diversions, we believe that the estimate of 1600 to 1800 for the Delta as a whole is probably correct. The time and duration of diversions through the various siphons and pumps varies substantially depending upon the area served, the crops, rainfall and availability of water due to seepage. The reference to Delta annual consumptive water use is misleading since much of the water needed by crops is provided by rainfall and seepage which do not involve the possibility of entrainment. In 1992, we conducted a fish screen test in cooperation with the California Department of Fish and Game, Department of Water Resources and the California Striped Bass Association on McDonald Island. The siphon which was picked for the test was a 12-inch siphon on Turner Cut which served a field

planted to wheat. Due to the availability of moisture from rainfall and seepage, the farmer only diverted water through the siphon for a four (4) day period in the later part of May. Although we were allowed to operate the siphon at other times for test purposes, our experience highlights the need for a rational approach to screening based on evaluation of each diversion. The results of the test provided to us by DWR are attached. No Striped Bass, no Delta Smelt, no Sacramento Split Tail and no Salmon were diverted.

We are familiar with the DWR study by Randall Brown referenced in your notice. Although we agree with a number of his conclusions, we believe his assumptions as to the timing and magnitude of Delta diversions are in error and overstate the potential for entrainment of eggs, larvae and fish. Delta depletions which utilize moisture from rainfall or seepage cannot result in the diversion of eggs, larvae or fish. There is no substitute for proper testing and study by an unbiased party. Mr. Brown warns us with his statement, "I was forced to make a lot of assumptions and to stretch the available data past comfortable limits. Because of the above limitations, the report contains only suggestions as to the magnitude of fish losses and the costs of screening."

Not all diversion facilities entrain fish or eggs.

The assumption that small diversions will divert fish, eggs and larvae from the channel in proportion to the amount of water diverted does not appear to be supported by previous study results. The 1972 sampling by David H. Allen of seven siphons on Sherman Island appears to confirm that some siphons don't divert any Striped Bass fish or eggs while others do. See attached Table 1 from such study. Possible important variables could be depth of intake, configuration of intake, channel flow characteristics and desirability of habitat near the intake.

Geological distribution of endangered fish in the Delta is certainly not uniform and probably not complete.

Test results and logic support the proposition that there is a greater possibility of diversion of endangered fish by way of diversions from locations containing the greatest numbers of such fish. It doesn't make sense to install fish screens to protect Winter-Run Chinook in areas where Winter-Run Chinook numbers are small or non-existent.

Screen Technology.

Technology and hardware appear to be available to screen small fish (1 inch or greater in length) but not eggs and larvae. Clogging and effectiveness in saving fish need further evaluation.

Cost

Our screen test leads us to believe that installation cost will exceed \$50,000 per siphon site. A major component is bringing electrical power to the site. Operation and maintenance costs are unknown. If we assume 1600 siphons, the installation cost estimate would be about \$80,000,000.00.

Rational Approach to Screening.

A rational approach to the screening of Delta diversions would be as follows:

- 1) Evaluate the cost and benefit of screening intakes vs. other measures to protect and enhance the desired fish species. Consideration should be given to other methods of reducing the diversion of fish such as baffles, reconfiguration of intakes and sonic devices along with increased flushing flows, increased outflow, hatcheries, etc. Such an evaluation should include identification of proven screening devices and related screen efficiencies.
- 2) Assuming screening diversions is the desired approach, determine which intakes should be screened and establish a priority list. For example, screening some intakes along the Sacramento River might be more beneficial than screening others in Turner Cut.
- 3) Identify the devices to be installed including a method whereby the device can be easily bypassed if plugging occurs so that crop loss can be avoided.
- 4) Provide the funding for installation, operation, maintenance and replacement without cost to Delta farmers.

Responsibility for Cost of Screening or Other Mitigation.

We do not believe that Delta farmers should be asked to pay for installation, operation, maintenance or replacement of fish screens. The delta lands were fully developed and irrigated long before there was a fishery problem. With the subsidence of the peat soils, we believe that each year more of the water used by Delta crops comes from seepage and thus

the amount directly diverted has probably substantially decreased since the late 1960's. The evidence indicates that high populations of competing species of Salmon and Striped Bass co-existed until about the time that the State Water Project (SWP) commenced operations. Both the CVP and SWP at times reduce Delta outflow and/or draw water away from the natural river courses thereby forcing fish, eggs and larvae from their natural areas and routes. In the case of both the Delta Smelt and Winter-Run Salmon, such actions appear to increase the possible exposure to diversion into the Delta. We recognize the probability that other actions coinciding with the operation of the SWP have adversely affected the fisheries, however, we know of no such action attributable to Delta farmers. The cost of screening Delta diversions is very substantial and well beyond the payment ability of Delta farmers. Imposition of such a burden would unjustly destroy Delta agriculture and the resulting benefits to waterfowl and other wildlife. With the destruction of agriculture, the ability to maintain levees will also be lost.

By law and agreement, only water surplus to the needs of the Delta and other watershed of origin areas was to be exported by the SWP and CVP and the Delta was to be maintained as a common fresh water pool. Additionally, the SWP and CVP were to provide salinity control for the Delta and a master drain was to be constructed for the San Joaquin Valley. See generally California Water Code Sections 1215 through 1222, 10505, 11460, 12201 through 12205 and Public Law 86-488, 74 Stat. 156.

The involvement of both the Federal and State governments as the instruments for export of water from the Delta has eliminated the possibility of unbiased regulatory action by our State and Federal agencies. This bias unfortunately permeates every aspect of water in California.

The burden for correcting the adverse impacts caused by the SWP and CVP should not be imposed upon others. The projects should mitigate all of their damages; they should be required to meet the affirmative obligations related to salinity control; and their exports should be limited to water which is truly surplus. Only after such steps are taken can the rightful burden of others be properly and fairly ascertained.

We recognize that many steps are being taken to attempt to correct the wrongful actions of the SWP and CVP, some of which would appear to alter the possible impact of un-screened diversions.

Gary Matlock

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December 17, 1993

Although we have preliminarily concluded that there is little justification for screening the multitude of small diversions in the Delta or even along the Sacramento River,

we are willing to positively participate in developing a rational and fair approach to screening agricultural diversions in the Delta and along the Sacramento River.

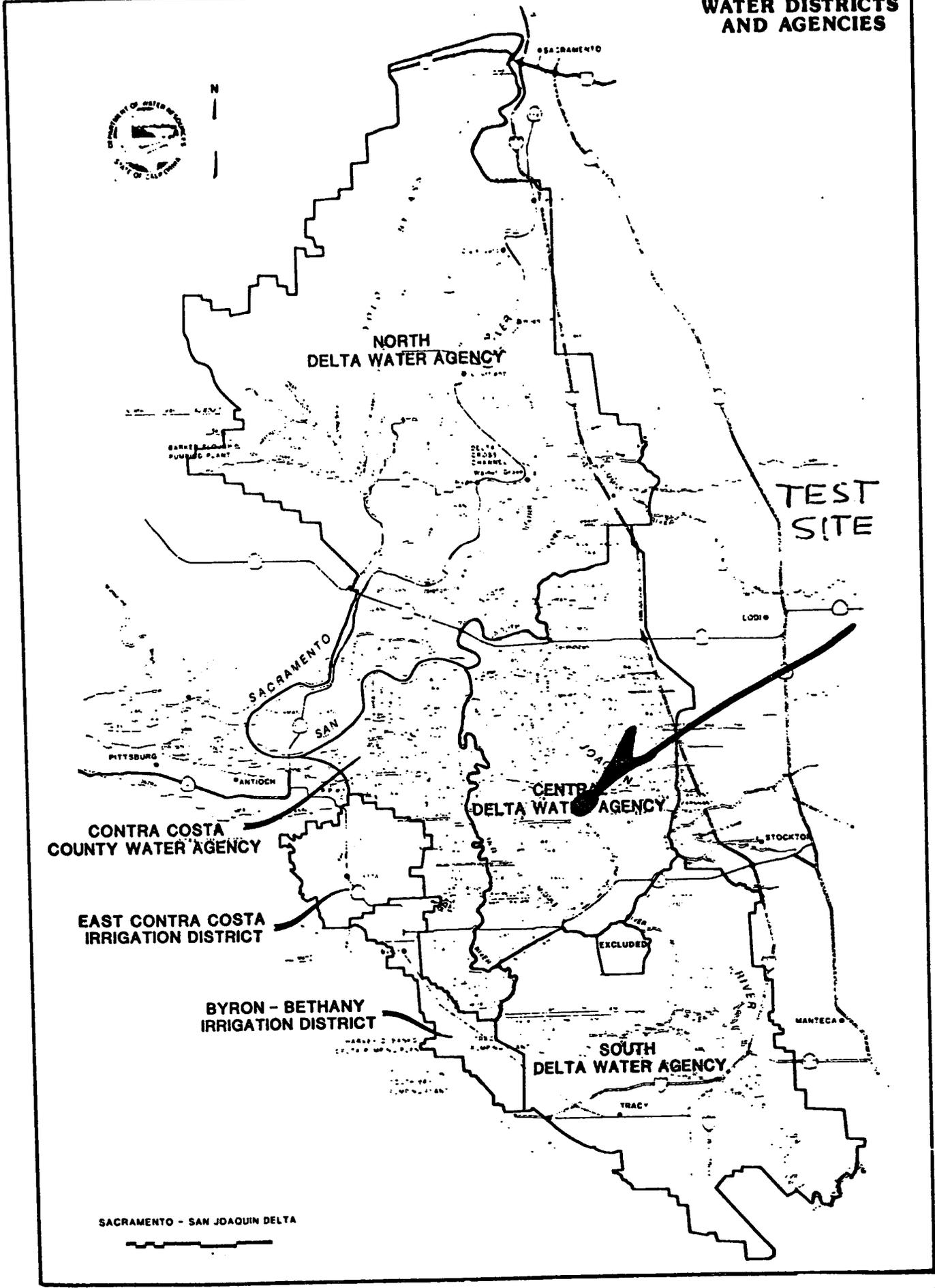
Yours very truly,



DANTE JOHN NOMEILLINI  
Manager and Co-Counsel

DJN:ju  
Enclosures

# WATER DISTRICTS AND AGENCIES



**1992 AGRICULTURAL DIVERSION FISH IMPACT STUDY  
MCDONALD TRACT**

NUMBER OF FISH CAUGHT  
MAY - AUGUST                      JUNE - AUGUST

Larval Fish                      Juveniles and Older

Species	*FISH SCREEN			*FISH SCREEN		
	Off	On	Total	Off	On	Total
Chameleon goby	1276	589	1865	0	0	0
Threadfin shad	1766	60	1826	0	0	0
Striped bass	0	0	0	0	0	0
Centrarchids	9	0	9	2 <sup>1</sup>	1 <sup>2</sup>	3
Delta smelt	0	0	0	0	0	0
Sacramento splittail	0	0	0	0	0	0
Mosquitofish	3	0	3	4	23	27
<b>TOTALS:</b>	<b>3054</b>	<b>649</b>	<b>3693</b>	<b>6</b>	<b>24</b>	<b>30</b>
<b>Eggs:</b>						
Striped bass	0	0	0	0	0	0
Threadfin shad	4	14	18	0	0	0
<b>TOTAL EGGS:</b>	<b>4</b>	<b>14</b>	<b>18</b>	<b>0</b>	<b>0</b>	<b>0</b>

<sup>1</sup> Green sunfish

<sup>2</sup> Bluegill

\* Sampling Times were equal for Screen off and on.

David H. Allen  
1972 Sampling

TABLE 1

Total Catches of Striped Bass Eggs and Young  
From Agricultural Diversions on Sherman Island

Total Catch Striped Bass Young Siphon								Total Catch Striped Bass Eggs Siphon									
Date	S-2	S-3	S-4	S-6	S-7	S-9	S-10	Total	Date	S-2	S-3	S-4	S-6	S-7	S-9	S-10	Total
5-3							3	3	5-3						0		0
5-5							3	3	5-5						0		0
5-9						3	0	3	5-9						0	0	0
5-11						9	4	13	5-11						49	0	49
5-15						0		0	5-15						131		131
5-17						1		1	5-17						7		7
5-19		8				0		8	5-19		35				5		40
5-23		11	1			0		12	5-23		2	1			0		3
5-25		59	3					62	5-25		74	15					89
5-31		64	20		39			123	5-31		4	3		1			8
6-2		43	2		19			64	6-2		0	1		1			2
6-14							22	22	6-14							0	0
7-7		2		2				4	7-7		0		0				0
7-11		4						4	7-11		0						0
7-14	2							2	7-14	0							0
Total	2	191	26	2	58	13	32	324	Total	0	115	20	0	2	132	0	329



# California Farm Bureau Federation

Office of the General Counsel

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Telephone (916) 924-4035 • FAX (916) 923-5318

March 28, 1994

VIA FACSIMILE AND MAIL (301) 713-2258

Gary Matlock  
Acting Regional Director  
National Marine Fisheries Service  
Southwest Region  
501 West Ocean Blvd., Ste. 4200  
Long Beach, CA 90802-4213

Re: Proposed Rulemaking Concerning Screening Requirements for Water  
Diversions From the Sacramento River and Delta to Protect Winter-run  
Chinook Salmon

Dear Mr. Matlock:

The California Farm Bureau Federation ("Farm Bureau") appreciates the opportunity to comment on the National Marine Fishery Service's ("NMFS") proposed rulemaking for the above matter. These comments are submitted pursuant to the notices in the Federal Register on October 18, 1993 (58 Fed. Reg. 53703) and January 20, 1994 (59 Fed. Reg. 3068).

Farm Bureau is the largest agricultural organization in California, representing more than 42,000 farm and ranch families--more than 80% of the state's commercial agricultural producers. Farm Bureau also represents more than 30,000 people who, although not directly involved in commercial agriculture, live and work in rural communities and are therefore very concerned about the continuing economic health of the agricultural industry as the backbone of their communities and way of life. Many of our members have built their livelihoods and their families upon the waters of the Sacramento River and the Delta. These farmers and ranchers either divert directly from the river system or receive water from districts, agencies or companies that divert from the river. Farm Bureau urges NMFS to seriously consider the comments of these individual diverters in addition to our comments.

As a general concept, Farm Bureau supports the use of fish screens as a tool to maintain the Sacramento River fisheries. There are, however, legal, biological, and economic constraints on NMFS' ability to require screens on all diversions. It is our hope that NMFS, rather than mandating screens, will encourage certain diverters to undertake

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screening in a manner that will maximize the protection of the salmon and other fish with minimum investment and impact. Our comments will focus upon the Sacramento River and Delta, but also point to the state-wide implications of this issue.

## **I. LEGAL CONSTRAINTS**

### **A. NMFS Must Comply With NEPA**

The National Environmental Policy Act (NEPA) was enacted to assure that federal agencies make informed, environmentally sound decisions when considering the significant impact that their actions may have on the environment. (42 U.S.C. §4321 *et seq.*) NEPA declares that it is "the responsibility of the Federal Government to use all practicable means... to...attain the widest range of beneficial uses of the environment without degradation, risk of health or safety, or other undesirable or unintended consequences." (*Id.* at §4331(b)(3).) In an effort to achieve this goal, NEPA requires that an environmental impact statement (EIS) must be prepared by a federal agency when it proposes to engage in a "major federal action" which may "significantly" affect the quality of the human environment." (*Id.* at §4332(2)(C); 40 C.F.R. §1500 *et seq.*) Considering that a rule requiring screens would be within the purview of these provisions, the NMFS must prepare an EIS.

### **B. NMFS Must Comply With the APA**

Any regulation promulgated by NMFS under its Endangered Species Act authority must comply with the formal rulemaking procedure in the Administrative Procedures Act (APA), (5 U.S.C. §706.) This means that any screening rules must be supported by substantial evidence. (See e.g., Citizens to Preserve Overton Park v. Volpe 401 U.S. 402,414 (1971); American Tunaboat Association v. Baldrige 738 F.2d 1013,1015 (9th Cir. 1984).) In the Federal Register, NMFS indicates that "unscreened diversions may be causing significant losses of juvenile winter-run chinook salmon since juveniles rear in the Sacramento River during a significant portion of the normal irrigation season." (58 Fed. Reg. 53703; emphasis added.) NMFS also indicated, "[h]owever, the magnitude of these diversions, and the extent to which these diversions cause significant losses of juvenile chinook salmon has not been adequately studied." (*Id.*) It therefore appears that NMFS does not have substantial evidence at this time to support an absolute regulation on screening diversions.

### **C. NMFS Must Conduct a Takings Implication Assessment**

In an effort to protect private property rights and to minimize government intervention that affects these rights, Executive Order 12,630 provides:

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"Responsible fiscal management and fundamental principles of good government require the government decision-makers to evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights.

(5 U.S.C. §601; Executive Order 12,630, §1(b).) Accordingly, this executive order requires federal agencies to perform a takings implication assessment (TIA)

"To assess the takings implication of proposed policies and actions on private property interest protected by the Fifth Amendment. In this way, federal agency decision makers will be better informed about the potential affects of proposed agency activities.

(U.S. Department of Justice, Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings at 2.) Therefore, NMFS must perform a TIA prior to adopting rules that will require screens because such action may divest private citizens of their water rights and other property rights.

#### D. NMFS Cannot Impair Water Rights

The NMFS must respect the well-established water rights of diverters and the users of the water. Remember that the cases cited by NMFS in the Federal Register held that pumping violated the ESA, not the actual use of the water. (58 Fed. Reg. 53704; See U.S. v. Glenn-Colusa (1992) Eastern District of California, Civil 5-91-1074.). Any regulation proposed by NMFS must not impair water rights.

## II. POLICY ISSUES

### A. Funding of Screens Is in The Public Interest

Funding is at the heart of any screening program and will undoubtedly dictate its success. It has been estimated that the costs of screening may be in excess of \$10,000 per cubic feet per second of water (cfs). This simply cannot be borne by the agricultural economies of the Sacramento Valley and Delta.

Congress and the California Legislature have made it clear that the protection of salmon and other fisheries is in the public interest. (16 U.S.C. §1531(a)(3) and (5); P.L. 102-575, §3401; Water Code §1243.) The public interest must therefore generate the funding for the physical improvements necessary to protect these fish. NMFS and the affected parties must actively seek to secure funding in conjunction with other federal agencies, including the use of the CVPIA §3407 Restoration Fund.

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**B. Screening Needs to be Prioritized**

To assure the efficient use of any funding, a screening priority list must be established. Put differently, NMFS must implement any program in a way that gives the most bang for the buck. This approach requires NMFS to step back and look at the entire river system rather than micro-managing each individual diversion. This will place emphasis on those diversions which actually harm the salmon. This approach is consistent with the goals of the ESA and the CVPIA to protect as many fish as possible, and would be the most effective means to accomplish these goals.

**C. Alternative Strategies Must Be Considered**

Farm Bureau firmly believes that comprehensive management is the real solution to the problems of the Sacramento River and the Delta. Many of the new technologies that have been advanced for use in the Sacramento River and Delta are an important part of this comprehensive solution. Certain alternatives to screens, such as acoustic and light barriers, will serve the goal of keeping fish out of diversions. NMFS needs to be receptive and open-minded to any alternatives to screens.

NMFS must also address all causes of salmon decline, not just the perceived problems with agricultural diversions. For example, fishing is one of the biggest culprits of reduced salmon populations. Additionally, the influence of non-native species, industrial discharges, and dredging of the Bay all have contributed significantly to this decline. The NMFS cannot continue to ignore these factors which require a comprehensive solution.

**D. Operation and Maintenance**

The construction and placement of a screen at a diversion is a major step, but it is only the beginning, not the end. Any NMFS program must assure that the screens will be operated and maintained to continue their effectiveness. This of course will require additional funding and commitment by NMFS.

**E. NMFS Needs to Allow Incidental Take**

Farm Bureau is very disappointed that NMFS will change the status of the winter-run chinook salmon from threatened to endangered. Although the scope of the "4(d) rule"<sup>1</sup> is not clear, it is obvious that NMFS, in changing the designation, will lose a certain degree of flexibility with respect to its management of the Sacramento River and Delta. By allowing

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<sup>1</sup> 16 U.S.C. §1533(d).

Gary Matlock  
March 28, 1994  
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incidental take at diversions, NMFS will nonetheless be able to provide as much flexibility for diverters and water users as possible.

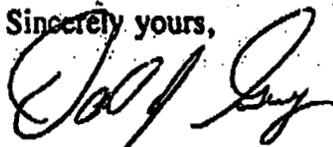
### **III. POSSIBLE SOLUTION**

As the previous discussion indicates, there are some serious constraints upon the NMFS to promulgate an absolute regulation for screening as it has suggested. Farm Bureau nonetheless believes that the screening of diversions, if done properly, will be part of a comprehensive solution to the problems of the Sacramento River and Delta. To this extent, we support a program by NMFS that will encourage, rather than mandate, the use of screening devices to help protect the fisheries in the Sacramento River and Delta.

Agricultural water users in the Sacramento Valley and Delta have proposed a "negotiated rulemaking" process that may lead to this type of solution. This process will allow farmers, ranchers, districts, and other affected parties the opportunity to jointly negotiate a proposed rule. Presumably a program would be formulated that is flexible for diverters and water users, and yet gives NMFS and other agencies some assurances that salmon will be protected. In other words, this process can be mutually advantageous to all interested parties and agencies. Farm Bureau urges NMFS to strongly consider using negotiated rulemaking for the screening of diversions.

Farm Bureau looks forward to participating in this process. Thank you for the opportunity to submit these comments.

Sincerely yours,



DAVID J. GUY

DJG/gt

DJG/GL032594.003

cc: County Farm Bureaus